

UNITED STATES DISTRICT COURT  
FOR THE EASTERN DISTRICT OF CALIFORNIA

SAM KURSHAN,

Plaintiff,

v.

SAFECO INSURANCE COMPANY OF  
AMERICA,

Defendant.

No. 2:22-cv-00225-DAD-AC

ORDER GRANTING DEFENDANT'S  
MOTION TO DISMISS

(Doc. No. 21)

This matter is before the court on a pending motion to dismiss filed by defendant Safeco Insurance Company of America. (Doc. No. 21.) On June 6, 2022, defendant's motion was taken under submission on the papers. (Doc. No. 27.)<sup>1</sup> For the reasons set forth below, the court will

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<sup>1</sup> The undersigned apologizes for the delay in the issuance of this order. This court's overwhelming caseload has been well publicized and the long-standing lack of judicial resources in this district long-ago reached crisis proportion. While that situation was partially addressed by the U.S. Senate's confirmation of district judges for two of this court's vacancies on December 17, 2021 and June 21, 2022, another vacancy on this court, with only six authorized district judge positions, was created on April 17, 2022 and remains unfilled. It has now been over thirty-seven months since this court has had its full complement of authorized district judges. For over twenty-two of those months the undersigned was left presiding over approximately 1,300 civil cases and criminal matters involving 735 defendants. That situation resulted in the court not being able to issue orders in submitted civil matters within an acceptable period of time and continues even now as the undersigned works through the predictable backlog. This has been frustrating to the court, which fully realizes how incredibly frustrating it is to the parties and their counsel.

1 grant defendants' motion to dismiss.

## 2 BACKGROUND

3 On February 2, 2022, plaintiff Sam Kurshan initiated this putative class action lawsuit  
4 against defendant Safeco Insurance Company of America ("Safeco") in this federal court pursuant  
5 to 28 U.S.C. § 1332(d), on the grounds that diversity jurisdiction exists under the Class Action  
6 Fairness Act. (Doc. No. 1.) Specifically, plaintiff alleges that the putative class contains at least  
7 100 class members, minimal diversity of citizenship is met, and the amount in controversy  
8 exceeds \$5,000,000. (*Id.* at ¶ 9.)

9 In the operative first amended complaint ("FAC"), plaintiff alleges as follows. Plaintiff  
10 purchased personal automobile insurance in California from Safeco prior to the start of the  
11 COVID-19 pandemic and the government shutdown and stay-at-home orders that followed.  
12 (Doc. No. 15 at ¶ 13.) In March 2020, while plaintiff's automobile insurance policy was in effect,  
13 the state of California and other states enacted shelter-in-place mandates. (*Id.* at ¶ 4.) As a result,  
14 "[d]uring the duration of the COVID-19 pandemic in 2020, [plaintiff] . . . barely drove his  
15 personal automobile at all and accordingly exposed his car, himself, and the general public to far  
16 [fewer] risks than what was expected prior to the COVID-19 pandemic." (*Id.* at ¶ 15.)

17 From April through June 2020, the California Insurance Commissioner ("CIC") Ricardo  
18 Lara issued a series of bulletins (the "CIC bulletins") ordering insurers to make "initial premium  
19 refund[s]" for certain months of the COVID-19 pandemic in 2020 "to all adversely impacted  
20 California policyholders . . . [of] [private] automobile insurance." (*Id.* at ¶¶ 20–23.) In response,  
21 defendant issued a "one-time 15% refund on two months of automobile premiums." (*Id.* at ¶ 21.)

22 Plaintiff asserts that the 15% refund was "not sufficient to compensate [consumers] for the  
23 overpayment of premiums" and "defies" the CIC bulletins. (*Id.* at ¶¶ 1–2, 17, 25.) Plaintiff  
24 accordingly brings this class action on behalf of himself and a purported class of "[a]ll California  
25 residents who purchased personal automobile, motorcycle, or RV insurance from [defendant]  
26 covering any portion of the time period from March 1, 2020 through March 1, 2021." (*Id.* at  
27 ¶ 30.) In his FAC, plaintiff asserts two claims: (1) violation of California's Unfair Competition  
28 Law ("UCL") pursuant to California Business & Professions Code § 17200, *et seq.*; and (2) unjust

1 enrichment. (*Id.* at ¶36–48.) Plaintiff seeks restitution from defendant and an order enjoining  
 2 defendant from engaging in the alleged “unfair and unlawful practices” described in the FAC.  
 3 (*Id.* at 12.)

4 Defendant filed the pending motion to dismiss on May 19, 2022. (Doc. No. 21.) On June  
 5 2, 2022, plaintiff filed his opposition to the pending motion, and defendant filed its reply thereto  
 6 on June 20, 2022. (Doc. Nos. 26, 30.) Defendant filed notices of supplemental authority on  
 7 September 28, 2022 and October 14, 2022. (Doc. Nos. 34, 36.) Plaintiff filed a notice of  
 8 supplemental authority on December 21, 2022. (Doc. No. 37.)

### 9 LEGAL STANDARD

#### 10 A. Motion to Dismiss Pursuant to Rule 12(b)(1)

11 “Federal courts are courts of limited jurisdiction and are presumptively without  
 12 jurisdiction over civil actions.” *Howard Jarvis Taxpayers Ass’n v. Cal. Secure Choice Ret. Sav.*  
 13 *Program*, 443 F. Supp. 3d 1152, 1156 (E.D. Cal. 2020) (citing *Kokkonen v. Guardian Life Ins.*  
 14 *Co.*, 511 U.S. 375, 377 (1994)), *aff’d*, 997 F.3d 848 (9th Cir. 2021). Federal courts “possess only  
 15 that power authorized by Constitution and statute, which is not to be expanded by judicial  
 16 decree.” *Kokkonen*, 511 U.S. at 377 (internal citations omitted). Subject matter jurisdiction is  
 17 required; it cannot be forfeited or waived. *Howard Jarvis Taxpayers Ass’n*, 443 F. Supp. 3d at  
 18 1156. Indeed, “[i]f the court determines at any time that it lacks subject-matter jurisdiction, the  
 19 court must dismiss the action.” Fed. R. Civ. P. 12(h)(3).

20 Rule 12(b)(1) of the Federal Rules of Civil Procedure provides that a party may  
 21 “challenge a federal court’s jurisdiction over the subject matter of the complaint.” *Nat’l Photo*  
 22 *Grp., LLC v. Allvoices, Inc.*, No. 3:13-cv-03627-JSC, 2014 WL 280391, at \*1 (N.D. Cal. Jan. 24,  
 23 2014). “A Rule 12(b)(1) jurisdictional attack may be facial or factual. In a facial attack, the  
 24 challenger asserts that the allegations contained in a complaint are insufficient on their face to  
 25 invoke federal jurisdiction.” *Safe Air for Everyone v. Meyer*, 373 F.3d 1035, 1039 (9th Cir. 2004)  
 26 (citing *White v. Lee*, 227 F.3d 1214, 1242 (9th Cir. 2000)). Here, because Safeco argues that the  
 27 allegations in plaintiff’s FAC are insufficient for the invocation of federal jurisdiction over  
 28 plaintiff’s claims for injunctive relief, Safeco mounts a facial attack under Rule 12(b)(1).

1 A party making a facial attack does not submit supporting evidence with the motion  
 2 because jurisdiction is challenged based solely on the pleadings. *Howard Jarvis Taxpayers Ass’n*,  
 3 443 F. Supp. 3d at 1156; *see also Diva Limousine, Ltd. v. Uber Techs., Inc.*, 392 F. Supp. 3d  
 4 1074, 1084 (N.D. Cal. 2019) (“[C]ourts do not consider evidence outside the pleadings when  
 5 deciding a facial attack.”) (citation omitted). “The district court resolves a facial attack as it  
 6 would a motion to dismiss under Rule 12(b)(6): [a]ccepting the plaintiff’s allegations as true and  
 7 drawing all reasonable inferences in the plaintiff’s favor, the court determines whether the  
 8 allegations are sufficient as a legal matter to invoke the court’s jurisdiction.” *Leite v. Crane Co.*,  
 9 749 F.3d 1117, 1121 (9th Cir. 2014). The court need not assume the truth of legal conclusions  
 10 cast in the form of factual allegations. *Warren v. Fox Family Worldwide, Inc.*, 328 F.3d 1136,  
 11 1139 (9th Cir. 2003).

12 **B. Motion to Dismiss Pursuant to Rule 12(b)(6)**

13 The purpose of a motion to dismiss pursuant to Rule 12(b)(6) is to test the legal  
 14 sufficiency of the complaint. *N. Star Int’l v. Ariz. Corp. Comm’n*, 720 F.2d 578, 581 (9th Cir.  
 15 1983). “Dismissal can be based on the lack of a cognizable legal theory or the absence of  
 16 sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901  
 17 F.2d 696, 699 (9th Cir. 1990). A plaintiff is required to allege “enough facts to state a claim to  
 18 relief that is plausible on its face.” *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007). “A  
 19 claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw  
 20 the reasonable inference that the defendant is liable for the misconduct alleged.” *Ashcroft v.*  
 21 *Iqbal*, 556 U.S. 662, 678 (2009).

22 In determining whether a complaint states a claim on which relief may be granted, the  
 23 court accepts as true the allegations in the complaint and construes the allegations in the light  
 24 most favorable to the plaintiff. *Hishon v. King & Spalding*, 467 U.S. 69, 73 (1984); *Love v.*  
 25 *United States*, 915 F.2d 1242, 1245 (9th Cir. 1989). However, the court need not assume the truth  
 26 of legal conclusions cast in the form of factual allegations. *U.S. ex rel. Chunie v. Ringrose*, 788  
 27 F.2d 638, 643 n.2 (9th Cir. 1986). While Rule 8(a) does not require detailed factual allegations,  
 28 “it demands more than an unadorned, the defendant-unlawfully-harmed-me accusation.” *Iqbal*,

1 556 U.S. at 678. A pleading is insufficient if it offers mere “labels and conclusions” or “a  
 2 formulaic recitation of the elements of a cause of action.” *Twombly*, 550 U.S. at 555; *see also*  
 3 *Iqbal*, 556 U.S. at 676 (“Threadbare recitals of the elements of a cause of action, supported by  
 4 mere conclusory statements, do not suffice.”). Moreover, it is inappropriate to assume that the  
 5 plaintiff “can prove facts which it has not alleged or that the defendants have violated the . . . laws  
 6 in ways that have not been alleged.” *Associated Gen. Contractors of Cal., Inc. v. Cal. State*  
 7 *Council of Carpenters*, 459 U.S. 519, 526 (1983).

8 In ruling on a motion to dismiss under Rule 12(b)(6), the court is permitted to consider  
 9 material which is properly submitted as part of the complaint, documents that are not physically  
 10 attached to the complaint if their authenticity is not contested and the plaintiffs’ complaint  
 11 necessarily relies on them, and matters of public record. *Lee v. City of Los Angeles*, 250 F.3d  
 12 668, 688–89 (9th Cir. 2001).

### 13 ANALYSIS

14 In its motion to dismiss, defendant argues that plaintiff’s FAC must be dismissed because  
 15 plaintiff lacks standing to pursue injunctive relief; the CIC has exclusive jurisdiction over the  
 16 issues raised in this action; even if the CIC does not have exclusive jurisdiction, the California  
 17 Department of Insurance (“DOI”) has *primary* jurisdiction over the issues raised in this case; and  
 18 plaintiff fails to state a cognizable UCL or unjust enrichment claim.<sup>2</sup>

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19 <sup>2</sup> Defendant has also filed a request for judicial notice of several exhibits, which include: (1)  
 20 plaintiff’s 2021–2022 Safeco insurance policy; (2) CIC bulletins issued between April 2020 and  
 21 March 2021; (3) a California DOI press release issued on March 11, 2021; (4) several Safeco rate  
 22 filings and memoranda in response to the CIC bulletins, all of which are publicly available on the  
 23 State of California’s website; and (5) the CIC’s amicus brief filed in *Rejoice! Coffee Co., LLC v.*  
 24 *Hartford Fin. Servs. Grp.*, No. 3:20-cv-06789-EMC (N.D. Cal. Sept. 17, 2021). (Doc. No. 21-4  
 25 at 3–4.) Because plaintiff challenges defendant’s actions with respect to an earlier-running  
 26 insurance policy, not the 2021–2022 Safeco insurance policy, that policy is not incorporated by  
 27 reference into the FAC, nor is it a matter of public record. Thus, the court denies defendant’s  
 28 request for judicial notice of that policy. With respect to the Safeco rate filings and memoranda,  
 although plaintiff contends that the judicial notice of these exhibits would be improper, “rate  
 filings made to . . . the California Department of Insurance . . . are public records noticeable  
 pursuant to Rule 201(b).” *Perryman v. Litton Loan Servicing, LP*, No. 3:14-cv-02261-JST, 2014  
 WL 4954674, at \*3 (N.D. Cal. Oct. 1, 2014); *see also Moreland Apartments Assocs. v. LP Equity*  
*LLC*, No. 5:19-cv-00744-EJD, 2019 WL 6771792, at \*3 n.3 (N.D. Cal. Dec. 12, 2019) (finding  
 that documents that are “publicly available on government websites” are subject to judicial

**A. Standing to Bring Claims for Injunctive Relief**

“[T]hose who seek to invoke the jurisdiction of the federal court must satisfy the threshold requirement imposed by Article III of the Constitution by alleging an actual case or controversy.” *City of Los Angeles v. Lyons*, 461 U.S. 95, 101 (1983); *see also City of Oakland v. Lynch*, 798 F.3d 1159, 1163 (9th Cir. 2015) (“A suit brought by a plaintiff without Article III standing is not a ‘case or controversy,’ and Article III federal courts lack subject matter jurisdiction over such suits.”) (*quoting Cetacean Cmty. v. Bush*, 386 F.3d 1169, 1174 (9th Cir. 2004)). An actual case or controversy will be held to exist when a plaintiff establishes standing. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). “[S]tanding requires that (1) the plaintiff suffered an injury in fact, i.e., one that is sufficiently ‘concrete and particularized’ and ‘actual or imminent, not conjectural or hypothetical,’ (2) the injury is ‘fairly traceable’ to the challenged conduct, and (3) the injury is ‘likely’ to be ‘redressed by a favorable decision.’” *Bates v. United Parcel Serv., Inc.*, 511 F.3d 974, 985 (9th Cir. 2007) (*en banc*) (citing *Lujan*, 504 U.S. at 560–61). These factors apply in the class action context. *See Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 n.6 (2016) (“That a suit may be a class action . . . adds nothing to the question of standing . . .”) (*quoting Simon v. Eastern Ky. Welfare Rights Org.*, 426 U.S. 26, 40 n.20 (1976)).

“Standing must be shown with respect to each form of relief sought, whether it be injunctive relief, damages or civil penalties.” *Bates*, 511 F.3d at 985. “[T]o establish standing to pursue injunctive relief . . . [plaintiff] must demonstrate a real and immediate threat of repeated injury in the future.” *Chapman v. Pier 1 Imports (U.S.) Inc.*, 631 F.3d 939, 946 (9th Cir. 2011) (internal quotation omitted). “Past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects.” *O’Shea v. Littleton*, 414 U.S. 488, 495–96 (1974). “Finally, a named plaintiff must show that she herself is subject to a likelihood of future injury,” rather than merely showing

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notice). The parties do not dispute that the remainder of defendant’s request for judicial notice pertains to matters of public record. Documents that constitute “matters of public record” may be judicially noticed. Fed. R. Evid. 201(b); *Intri-Plex Techs., Inc. v. Crest Grp., Inc.*, 499 F.3d 1048, 1052 (9th Cir. 2007) (citing Fed. R. Evid. 201(b)). Therefore, the court will take judicial notice of defendant’s remaining exhibits, but only as to the existence of those documents.

1 “that a defendant’s conduct will subject unnamed class members to the alleged harm.” *Phillips v.*  
 2 *Apple Inc.*, No. 5:15-cv-04879-LHK, 2016 WL 5846992, at \*6 (N.D. Cal. Oct. 6, 2016) (citing  
 3 *Hodgers-Durgin v. de la Vina*, 199 F.3d 1037, 1044–45 (9th Cir. 1999)).

4 Here, defendant argues that plaintiff lacks standing to seek injunctive relief because he  
 5 “does not and cannot plead any facts establishing a sufficient likelihood of repetitive harm.”  
 6 (Doc. No. 21-1 at 19.) The court agrees. Plaintiff asserts that he suffered an injury in fact due to  
 7 defendant failing to provide plaintiff with a sufficient refund for having overpaid insurance  
 8 premiums during shelter-in-place and stay-at-home orders imposed due to the COVID-19  
 9 pandemic in certain months of 2020. (Doc. No. 15 at ¶¶ 1, 17, 25.) Plaintiff does not allege any  
 10 facts whatsoever suggesting that he faces “a real and immediate threat of repeated injury in the  
 11 future.” *Chapman*, 631 F.3d at 946. Plaintiff does not even address defendant’s argument in this  
 12 regard in his opposition to the pending motion to dismiss, apparently conceding that he cannot  
 13 allege a likelihood of repeated injury. *See Lopez v. County of Los Angeles*, No. 3:15-cv-03804-  
 14 TEH, 2016 WL 54123, at \*2 (N.D. Cal. 2016) (“[B]ecause Plaintiff failed to oppose many  
 15 arguments in the instant motion to dismiss, the Court may treat such non-opposition as implicit  
 16 consent to the merits of the arguments asserted, and consequently as consent to dismissal of the  
 17 Complaint.”) Because plaintiff has pled no facts alleging a likelihood of future harm, the court  
 18 finds that plaintiff lacks standing to seek injunctive relief in this case and will dismiss plaintiff’s  
 19 injunctive relief claims, without leave to amend.

20 Given that plaintiff’s alleged injury was tied to shelter-in-place orders that were unique to  
 21 a portion of time during the COVID-19 pandemic in 2020, the court deems that granting leave to  
 22 amend as to this aspect of plaintiff’s complaint would be futile. *See Brown v. Stored Value*  
 23 *Cards, Inc.*, 953 F.3d 567, 574 (9th Cir. 2020) (noting that leave to amend need not be granted  
 24 where amendment would be futile).

## 25 **B. Whether the CIC has Exclusive Jurisdiction over Plaintiff’s Claims**

26 Next, defendant argues that this court lacks jurisdiction over plaintiff’s claims brought in  
 27 this action because his claims fall under the CIC’s exclusive jurisdiction over the setting of  
 28 insurance rates. (Doc. No. 21-1 at 11–12). In his opposition, plaintiff disputes that his claims are



1 precluded by California’s insurance rate approval process, arguing that plaintiff “is not  
2 challenging approved [insurance] rates and rating factors,” which would fall under the CIC’s  
3 exclusive jurisdiction, but rather is challenging “the application of approved rates,” which fall  
4 outside the ambit of the CIC’s exclusive jurisdiction. (Doc. No. 26 at 10.)

5 The California Insurance Code provides that “[i]nsurance rates subject to this chapter,”  
6 including automobile insurance, “must be approved by the commissioner prior to their use.” Cal.  
7 Ins. Code. § 1861.01(c). Prior to changing an insurance rate, an insurer must file a “rate  
8 application with the commissioner,” and the California Code of Regulations “establish the  
9 process and policies the Commissioner shall employ to determine whether the proposed rates are  
10 excessive or inadequate.” Cal. Ins. Code § 1861.05(b); 10 Cal. Code Regs. § 2641.3. “An  
11 insured may challenge proposed or approved rates through administrative proceedings, which are  
12 subject to limited judicial review.” *Day v. GEICO Cas. Co.*, 580 F. Supp. 3d 830, 836 (N.D. Cal.  
13 2022) (citing Cal. Ins. Code §§ 1858, 1858.6.)

14 Pursuant to the California Insurance Code, no “action taken . . . pursuant to the authority  
15 conferred by this chapter shall constitute . . . grounds for . . . civil proceedings under any other  
16 law of this State . . . which does not specifically refer to insurance.” Cal. Ins. Code § 1860.1.  
17 However, the California Insurance Code also provides that “[t]he business of insurance shall be  
18 subject to the laws of California applicable to any other businesses, including . . . the antitrust and  
19 unfair business practices laws.” *Id.* § 1861.03. “California courts have clarified that, in the face  
20 of this apparent contradiction, the sections are to be ‘harmoniz[ed]’ by ‘narrowly construing the  
21 section 1860.1 immunity.” *Day*, 580 F. Supp. 3d at 836 (quoting *Ellsworth v. U.S. Bank, N.A.*,  
22 908 F. Supp. 2d 1063, 1082 (N.D. Cal. 2012)). California courts have thus found that challenges  
23 to approved insurance rates and rating factors are under the exclusive jurisdiction of the CIC,  
24 while challenges to the *application* of approved rates are not within that exclusive jurisdiction.  
25 *See id.* at 837 (citing cases).

26 As a preliminary matter, the court notes that this action is not the first federal action in  
27 California challenging the adequacy of insurance refunds provided in light of the COVID-19  
28 pandemic. *See, e.g., Day*, 580 F. Supp. 3d at 837. The parties do not dispute that the district



1 courts in California that have considered the same issues as those presented in this action have  
 2 unanimously concluded that such claims are not within the exclusive jurisdiction of the CIC. *See*  
 3 *id.* (holding that plaintiff's claims were not within the exclusive jurisdiction of the CIC because  
 4 plaintiff did not challenge "approved rates and rating factors" but rather the "application of  
 5 approved rates") (citation omitted); *Drawdy v. Nationwide Ins. Co. of Am.*, No. 2:22-cv-00271-  
 6 JAM-KJN, 2022 WL 3020050, at \*2 (E.D. Cal. July 29, 2022) (same); *Boobuli's LLC v. State*  
 7 *Farm Fire & Cas. Co.*, 562 F. Supp. 3d 469, 480 (N.D. Cal. 2021) (same); *Torrez v. Infinity Ins.*  
 8 *Co.*, No. 2:22-cv-05171-SVW-JC, 2022 WL 6819848, at \*4 (C.D. Cal. Oct. 11, 2022) (same);  
 9 *Rejoice! Coffee Co., LLC v. Hartford Fin. Servs. Grp., Inc.*, No. 3:20-cv-06789-EMC, 2021 WL  
 10 5879118, at \*6 (N.D. Cal. Dec. 9, 2021) (same). While acknowledging the unanimous weight of  
 11 persuasive authority on this issue, defendant nevertheless asserts that "those decisions were  
 12 wrong" and points instead to decisions from Mississippi, New York, Nevada, and the Eighth  
 13 Circuit. (Doc. No. 21-1 at 13, 16–17) (collecting cases). However, the court finds that "these  
 14 decisions interpreting other state[s'] insurance codes have no bearing on the present analysis" of  
 15 plaintiff's claims, which are governed by California insurance law. *Drawdy*, 2022 WL 3020050,  
 16 at \*2. Moreover, the court agrees with the detailed exclusive jurisdiction analyses set forth by the  
 17 district judges in *Day*, *Boobuli's*, and *Rejoice!*, which distinguished the California caselaw cited  
 18 by defendant in its pending motion. *See Day*, 580 F. Supp. 3d at 838; *Boobuli's*, 562 F. Supp. 3d  
 19 at 479–482; *Rejoice!*, 2021 WL 5879118, at \*5–\*7. Thus, the court finds that plaintiff's claims  
 20 challenge the application of approved insurance rates, rather than the rates themselves, and  
 21 therefore, plaintiff's claims do not fall within the CIC's exclusive jurisdiction.

### 22 **C. Dismissal Pursuant to the Primary Jurisdiction Doctrine**

23 Defendant also contends that the court should dismiss this action pursuant to the primary  
 24 jurisdiction doctrine. The primary jurisdiction doctrine is a "prudential doctrine under which  
 25 courts may, under appropriate circumstances, determine that the initial decisionmaking

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responsibility should be performed by the relevant agency rather than the courts.”<sup>3</sup> *Syntek Semiconductor Co., Ltd. v. Microchip Tech. Inc.*, 307 F.3d 775, 780 (9th Cir. 2002). “The doctrine is applicable whenever the enforcement of a claim subject to a specific regulatory scheme requires resolution of issues that are ‘within the special competence of an administrative body.’” *Davel Commc’ns., Inc. v. Qwest Corp.*, 460 F.3d 1075, 1086 (9th Cir. 2006) (quoting *Farley Transp. Co. v. Santa Fe Trail Transp. Co.*, 778 F.2d 1365, 1370 (9th Cir. 1985)). In addition, the Ninth Circuit has explained that “the primary jurisdiction doctrine is designed to protect agencies possessing ‘quasi-legislative powers’ and that are ‘actively involved in the administration of regulatory statutes.’” *Clark v. Time Warner Cable*, 523 F.3d 1110, 1115 (9th Cir. 2008) (quoting *United States v. Gen. Dynamics Corp.*, 828 F.2d 1356, 1365 (9th Cir. 1987)). “[N]o fixed formula exists for applying the doctrine of primary jurisdiction.” *Clark*, 523 F.3d at 1115. Rather, “the doctrine of primary jurisdiction is committed to the sound discretion of the court when ‘protection of the integrity of the regulatory scheme dictates preliminary resort to the agency which administers the scheme.’” *Syntek*, 307 F.3d at 781 (quoting *Gen. Dynamics Corp.*, 828 F.2d at 1362).

“Where an issue falls within an agency’s primary jurisdiction, the district court enables ‘referral’ of the issue to the agency.” *Davel*, 460 F.3d at 1087. “In practice, this means that the court either stays proceedings or dismisses the case without prejudice, so that the parties may

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<sup>3</sup> “A court’s invocation of this doctrine does not indicate that it lacks jurisdiction.” *Clark v. Time Warner Cable*, 523 F.3d 1110, 1114 (9th Cir. 2008); *see also Kontrick v. Ryan*, 540 U.S. 443, 454 (2004) (“Jurisdiction . . . is a word of many, too many, meanings.”) (quoting *Steel Co. v. Citizens for Better Env’t*, 523 U.S. 83, 90 (1998)). “Rather, the doctrine is a ‘prudential’ one, under which a court determines that an otherwise cognizable claim implicates technical and policy questions that should be addressed in the first instance by the agency with regulatory authority over the relevant industry rather than by the judicial branch.” *Clark*, 523 F.3d at 1114. While challenges to the court’s subject matter jurisdiction are appropriate for resolution under Rule 12(b)(1), prudential jurisdictional issues are appropriately resolved under Rule 12(b)(6). *See Hull v. I.R.S., U.S. Dep’t of Treasury*, 656 F.3d 1174, 1182 (10th Cir. 2011) (“Courts generally dismiss suits on prudential grounds pursuant to Rule 12(b)(6) for failure to state a claim rather than Rule 12(b)(1) for lack of subject matter jurisdiction.”); *see also Solarmore Mgmt. Servs., Inc. v. Bankr. Est. of DC Solar Sols.*, 2:19-cv-02544-JAM-DB, 2021WL 3077470, at \*2 (E.D. Cal. July 21, 2021) (explaining that a motion to dismiss for lack of prudential standing is appropriate for resolution under Rule 12(b)(6) rather than Rule 12(b)(1)).

1 seek an administrative ruling.” *Clark*, 523 F.3d at 1114. “There is no formal transfer mechanism  
 2 between the courts and the agency; rather, upon invocation of the primary jurisdiction doctrine,  
 3 the parties are responsible for initiating the appropriate proceedings before the agency.” *Syntek*,  
 4 307 F.3d at 782 n.3.

5 As a preliminary matter, the parties in this case do not dispute that the court has the  
 6 authority to dismiss this action pursuant to the primary jurisdiction doctrine. (*See* Doc. Nos. 21-1  
 7 at 17; 26 at 14–15.) Rather, plaintiff disputes whether the court should exercise its discretion to  
 8 do so, arguing that applying the doctrine here is not “necessary” to protect the DOI’s  
 9 administration of the state’s insurance scheme. (*See* Doc. No. 26 at 14–15.) Having considered  
 10 plaintiff’s argument in this regard, the court nonetheless agrees with defendant that plaintiff’s  
 11 claims “implicate the same sort of technical and policy questions that the [CIC] regularly  
 12 considers when assessing premiums.” (Doc. No. 21-1 at 17.)

13 Plaintiff’s FAC asks the court to consider CIC bulletins assessing the appropriateness of  
 14 premium refunds, as well as independent studies analyzing insurance company profits in 2020  
 15 measured against COVID-19 premium relief. (*See* Doc. No. 15 at ¶¶ 20–28.) “The pleadings  
 16 alone show that [plaintiff] is asking the court to engage in a technical inquiry: how fair  
 17 [defendant’s] risk calculation was in determining its premium rebate and ensuring that  
 18 [defendant] does not obtain an improper windfall.” *Torrez*, 2022 WL 6819848, at \*4 (describing  
 19 a plaintiff’s UCL claim challenging the adequacy of 15–20% rebates from an insurer in light of  
 20 the COVID-19 pandemic). Moreover, the CIC “is actively engaged in COVID-19 related  
 21 premium adjustment” and thus would be well-equipped to consider plaintiff’s allegations  
 22 advanced in this action. *See Boobuli’s*, 562 F. Supp. 3d at 484; *cf. Astiana v. Hain Celestial Grp.,*  
 23 *Inc.*, 783 F.3d 753, 761 (9th Cir. 2015) (“Common sense tell us that even when agency expertise  
 24 would be helpful, a court should not invoke primary jurisdiction when the agency is aware of but  
 25 has expressed no interest in the subject matter of the litigation.”) The CIC’s expertise in and  
 26 active engagement with the precise issues raised by plaintiff in this action also suggest that the  
 27 referral of these issues to the DOI will “enhance court decision-making and efficiency by  
 28 allowing the court to take advantage of administrative expertise” and “will help assure uniform

1 application of regulatory laws.” *Chabner v. United of Omaha Life Ins. Co.*, 225 F.3d 1042, 1051  
2 (9th Cir. 2000); *see also Astiana*, 783 F.3d at 760 (describing the primary jurisdiction doctrine as  
3 rooted, in part, in “judicial efficiency”) (quoting *United States v. Philip Morris USA Inc.*, 686  
4 F.3d 832, 838 (D.C. Cir. 2012)).<sup>4</sup>

5 The court therefore concludes that it would be more appropriate for the CIC, which has  
6 the relevant technical expertise, to first consider plaintiff’s claims. *See Drawdy*, 2022 WL  
7 3020050, at \*3 (applying the primary jurisdiction doctrine and granting motion to dismiss  
8 plaintiff’s claims challenging to adequacy of auto insurer’s refunds provided in light of the  
9 COVID-19 pandemic).

10 Accordingly, the court will grant defendant’s motion to dismiss plaintiff’s FAC without  
11 prejudice, pursuant to the primary jurisdiction doctrine. Because the court dismisses this action  
12 pursuant to the primary jurisdiction doctrine, the court need not reach the remainder of  
13 defendant’s argument in support of dismissal pursuant to Rule 12(b)(6).

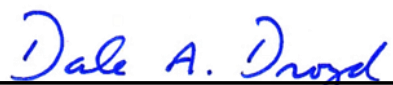
#### 14 CONCLUSION

15 For the reasons set forth above:

- 16 1. Defendant’s motion to dismiss is granted in part as follows:
  - 17 a. Plaintiff’s injunctive relief claims are dismissed due to plaintiff’s lack of  
18 standing;
  - 19 b. All of plaintiff’s remaining claims are dismissed, without prejudice,  
20 pursuant to the primary jurisdiction doctrine;
  - 21 c. Defendant’s motion to dismiss is otherwise denied;
- 22 2. This action is dismissed, without prejudice; and
- 23 3. The Clerk of the Court is directed to close this case.

24 IT IS SO ORDERED.

25 Dated: January 26, 2023

26   
UNITED STATES DISTRICT JUDGE

27  
28 <sup>4</sup> See fn. 1, above.